Supreme Court, U.S.
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MAY 28 2002

No. 01-1562

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

FERNANDO EROS CARO, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
CONCLUSION	3

TABLE OF AUTHORITIES

Page

Cases

Caro v. Calderon
165 F.3d 1223 (9th Cir. 1999) 2

Strickland v. Washington
466 U.S. 668 (1984) 1

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Respondent Caro's Brief in Opposition further demonstrates the need to grant certiorari. Our reply is briefly stated.

1. Caro insists the Ninth Circuit "conducted a thorough and proper *Strickland*[1] analysis . . . ." Opp. at 7. Conspicuous by its absence, however, is any defense of the circuit court's deficient performance analysis, an omission that is not surprising inasmuch as the court provided none. Caro effectively concedes that the court based its finding of inadequate performance solely on the development of new evidence in the habeas corpus proceedings. The district court so found and Caro makes no effort to contest that conclusion. As demonstrated in the petition, the circuit court ignored the several mental health experts hired by trial counsel, the negative results from testing of Caro's blood for pesticide residue, and the extensive mitigation case actually presented at trial. The Ninth Circuit's per se rule of deficient performance based solely on newly created evidence is inconsistent with *Strickland*, as the Court again emphasized this Term. *Bell v. Cone*, No. 01-400

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1. *Strickland v. Washington*, 466 U.S. 668 (1984).

(May 28, 2002).

2. Caro suggests the State waived any objection to the circuit court's requirement that counsel find and present all available mitigation by not challenging that language in our petition for certiorari from *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999) [*Caro I*]. Opp. at 4-5 and n. 3. As explained in the petition, it is the Ninth Circuit's conversion of an admonition on the importance of seeking out mitigation into a rule automatically converting the failure to find mitigation into deficient performance that directly contradicts this Court's jurisprudence on ineffective assistance of counsel. Pet. at 13-14 and n. 10.

3. Caro acknowledges that the finding of prejudice was based primarily, if not solely, on the absence of specific additional mitigation. Opp. at 8-9. The circuit court concluded it was bound to find that evidence mitigating and its absence prejudicial yet made virtually no effort to assess the evidence in light of the extensive mitigation case actually before the jury or the overwhelming evidence in aggravation. The suggestion, endorsed by Caro, that the absence of a single, specific type of mitigation will necessarily establish prejudice cannot be reconciled with the requirements of *Strickland*.

4. Contrary to Caro's assertion, Opp. at 14-16, petitioner is not seeking to relitigate lower court fact findings. The petition does not contest the district court's finding that Caro had proven brain damage. Rather, the question is whether the development of such evidence in habeas corpus proceedings is alone sufficient to establish both the performance and prejudice prongs of *Strickland*. The Ninth Circuit found it could, creating in effect a per se rule of reversal whenever new mitigation is created in collateral proceedings. That rule effectively eviscerates the *Strickland* standard.

CONCLUSION

For the above reasons and those set forth in the petition certiorari should be granted.

Dated: May 28, 2002

Respectfully submitted,

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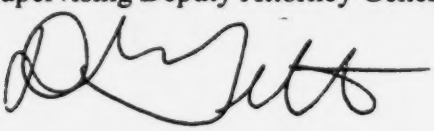

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CERTIFICATE OF SERVICE BY MAIL

DANE R. GILLETTE, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 455 Golden Gate Avenue, Suite 13000, in the City and County of San Francisco, State of California; that on May 28, 2002, he served three true copies of the Reply To Brief In Opposition To Petition For Writ Of Certiorari in the above-entitled matter on the respondent and by placing same in envelopes addressed as follows:

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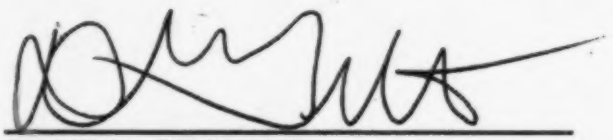

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